

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, CA 95814



January 31, 1992

ALL COUNTY LETTER NO. 92-17

TO: ALL COUNTY WELFARE DIRECTORS
ALL CHIEF PROBATION OFFICERS
ALL PRESIDING JUVENILE COURT JUDGES

SUBJECT: COURT ORDER FINDINGS AND ELIGIBILITY FOR AID TO
FAMILIES WITH DEPENDENT CHILDREN-FOSTER CARE
(AFDC-FC)

The purpose of this letter is to clarify the AFDC-FC eligibility requirements for specific court findings in juvenile court orders. This letter supersedes sections of All County Information Notice No. I-91-85 concerning court orders and AFDC-FC eligibility.

Court Findings and AFDC-FC Eligibility

Federal and State statute and the State Eligibility and Assistance Standards (EAS) Manual require three specific court findings in order for AFDC-FC eligibility to exist. More specifically, in order to satisfy the Authority for Placement requirements found in EAS Section 45-202.4 (the Federal Program) and 45-203.313 (the State Program) the child must be removed from the home of a parent or relative and placed pursuant to a court order which remains in effect and specifies:

- (a) that the responsibility for placement and care be vested in one of the agencies designated by law;
- (b) that continuance in the home of that parent or relative would be contrary to the child's welfare; and
- (c) that, if the child is placed into foster care on or after October 1, 1983, reasonable efforts have been made to prevent or eliminate the need for removal of the child from his or her home and to make it possible for the child to return to his or her home.

State Welfare and Institutions Code (WIC) Section 11401 (b)(1) permits the following alternative to (c) above:

"or, in cases where the first contact with the family occurs during an emergency situation in which the child could not safely remain at home even with reasonable efforts being provided, the child has been removed as a result of a judicial determination that lack of preplacement preventive efforts, as defined in Section 16501.1, was reasonable."

The required findings are essentially identical for the State and Federal AFDC-FC Programs. They are based on the language contained in WIC Section 11401, which in turn is based on the language found in Public Law 96-272.

The findings must be made at the time that a child is removed from his or her home in order for AFDC-FC eligibility to exist. In California, this requirement is met if the findings are made in the original detention, jurisdictional or dispositional orders. Provided the findings are made in one of these original orders, they need not be repeated in subsequent orders. The AFDC-FC beginning date of aid will vary depending on which court order contains the requisite findings (see All County Letter No. 91-49). Until such time as all three findings are made in one of the orders, AFDC-FC eligibility does not exist and can not be claimed.

Recommended County Reviews

The court does not make these findings for purposes of AFDC-FC eligibility. The findings are rather based on judicial review of fact. Nevertheless, the CWD and Probation Departments may take action to ensure that all relevant information and an appropriate format are available to the court.

For example, in most counties a "check-box" court order form is used to facilitate court actions. However, the court order forms may not include appropriate boxes for findings of "reasonable efforts", "placement and care" and/or "the child's welfare." Or counties may find that only the jurisdictional/dispositional order form contains the requisite boxes while the detention order does not, thereby delaying the beginning date of aid until the time of the later court order. In either case, the detention court order form could be revised to incorporate check-boxes for the requisite findings.

Alternately, the court order form may incorporate the appropriate boxes but the findings may not be routinely made or checked on the order. Here the CWD may want to communicate with the court to ensure that such findings are not accidentally omitted. Similarly, in those counties where the findings of the court are largely based on a check-box "hearing report" prepared by social work staff, the CWD may have to revise its hearing report form or emphasize its eligibility needs to services staff.

Whatever the protocol or form used, all CWDs and Probation Departments are encouraged to review their cases and court order findings for compliance with statute and regulation.

Variations in Court Language

If a juvenile court order contains language which does not match exactly with that in statute, it is important that the alternative language effectively mirror the requisite findings. For example, the required finding that continuance in the home is contrary to the child's welfare might become "there is substantial danger to the welfare of the minor without removing the minor," or "the welfare of minor requires that custody be taken from parents." We believe this language effectively mirrors the requisite finding and should prove acceptable to the Federal government. There is no specific requirement that County court orders contain the identical language found in statute. Nevertheless, a minor revision in such language would ensure compliance, and we recommend that counties adopt the exact language of EAS 45-202/203 when next revising their hearing report and/or court order forms.

Nunc Pro Tunc Orders

If existing foster care cases lack AFDC-FC eligibility because of court orders that do not make the requisite findings, CWDs may wish to consider a nunc pro tunc order to correct the original order. However, nunc pro tunc orders are only acceptable if the finding in question was actually made at the time of removal and was not recorded due to error or omission. To quote from the United States Department of Health and Human Services, Administration for Children, Youth and Families Information Memorandum 87-28 (attached), "Courts have the authority to enter an order nunc pro tunc to supply for the record something that has actually occurred, but was omitted from the record through inadvertence or mistake." The argument that a particular finding could have been made because of case circumstances is not sufficient; again, a nunc pro tunc order will not be accepted unless the finding in question was actually made at the time of removal but was not recorded due to error or omission.

We are attaching two Federal Information Memoranda on the subject of nunc pro tunc orders for your review. Please note that a county which uses nunc pro tunc orders may be required by Federal auditors to document that the findings in such orders were actually made at the time of removal. Please also note that the Federal agency will determine the form of documentation required. We recommend that any county considering the use of nunc pro tunc orders familiarize themselves with these Memoranda.

If you have additional questions on the subject of court orders and AFDC-FC eligibility, you may contact your Foster Care Program Consultant at (916) 445-0813.



LOREN D. SUTER
Deputy Director
Adult & Family Services Division

Attachment

cc: CWDA

file copy

CB

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services

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration for Children, Youth and Families

1. Log No. ACYF-IM-89-08

2. Issuance Date: 4/17/89

3. Originating Office: Children's Bureau

4. Key Word: The Use of Nunc Pro Tunc Orders to

Verify Title IV-E Eligibility^{ACYF}

INFORMATION MEMORANDUM

TO : State Agencies Administering or Supervising the
Administration of Title IV-E of the Social
Security Act (the Act)

SUBJECT : Use of Nunc Pro Tunc Orders to Satisfy the
Judicial Determination Requirement of Section
472(a)(1) of the Act.

LEGAL AND RELATED
REFERENCES : Sections 471(a)(15) and 472(a)(1) of the Act,
ACYF-IM-87-28, dated 10/7/88, and ACYF-PA-84-1,
dated 1/13/84

BACKGROUND : Title IV-E eligibility for foster care is based,
in part, upon two judicial determinations: (1)
that continuation in the home would be contrary to
the welfare of the child; and (2) that reasonable
efforts were made prior to placement to prevent or
eliminate the need for removal of a child from his
home. The reasonable efforts determination is an
important protection for children living in
troubled homes to assure that appropriate services
are provided to prevent the separation of the
family by the removal of the children and their
placement in foster care.

The State agency's role is to provide the appropriate preventive services. The court's role in making the determination that reasonable efforts were made by the agency to prevent removal is critical to the outcome of the case. The Federal agency's role is to confirm, through documentation provided by the court, that the judicial determination was made at the time of removal. If documentation of a timely determination is not available at the Federal review, the State is permitted time to secure evidence from the court that the judicial determination was actually made at the time of removal. Some State agencies have supplied nunc pro tunc orders as such documentation.

The acceptable use of nunc pro tunc orders for the purpose of meeting the judicial determination requirements set forth in section 472(a)(1) of the Act was described in ACYF-IM-87-28, dated October 7, 1987. This IM is specific about what constitutes an acceptable nunc pro tunc order in the conduct of title IV-E financial reviews. It states that courts can "enter an order nunc pro tunc to supply, for the record, something that has actually occurred, but was omitted from the record through inadvertence or mistake." It further states that "a nunc pro tunc order . . . may not be used to predate the actual performance of an act that had not taken place." Therefore, nunc pro tunc orders have been admissible in title IV-E financial reviews to meet the requirements of section 472(a)(1) only when they are used to correct errors or omissions in the original removal order. If a nunc pro tunc order actually modifies the substance of a prior ruling or constitutes a ruling not previously made, it cannot be given retrospective effect.

Examination of recent nunc pro tunc orders submitted by States to satisfy the judicial determination requirements indicates that there is confusion about the acceptable interpretation of the term nunc pro tunc in the title IV-E program as well as some misuse of nunc pro tunc orders in relation to title IV-E eligibility. The confusion regarding the term may be due to the fact there are two legal interpretations of nunc pro tunc in ordinary use by the courts. In the broader meaning of the term, the court may allow for an action to be taken after the time it should have been taken, with a retroactive effect. The more narrow interpretation allows the court only to supply for the record documentation of an action that had actually occurred. The narrow interpretation, as set forth in ACYF-IM-87-28, is the only acceptable interpretation to satisfy the judicial determination requirements in section 472(a)(1).

We have also found that nunc pro tunc orders have been utilized in some States in a widespread, undifferentiated manner, primarily to maintain eligibility for Federal funds, rather than to focus on the assurance of a judicial determination at the time of removal as a protection to the child and his family.

The frugal use of nunc pro tunc orders in title IV-E is necessary to assure the integrity of the foster care system and, specifically, to assure that all title IV-E eligible children are afforded the protections to which they are entitled, at the time they are entitled to them, and which are required by the law.

In addition to confusion about acceptable application and misuse of nunc pro tunc orders, there also may be misunderstanding about the necessity for additional documentation to verify that the determination had actually been made at the removal hearing. ACYF-IM-87-28 made clear that the Federal agency may request any documentation that it determines is necessary to verify that the court actually made the determination at the removal hearing. As indicated by that Information Memorandum, it is the Federal agency which determines what documentation will be necessary. The list of examples of what may be requested of the State for verification purposes does not mean that States may choose the one(s) they will submit.

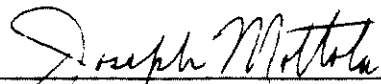
The purpose of this Information Memorandum is to reiterate and clarify existing procedures regarding acceptable documentation/verification of the judicial determination at the time of the removal hearing.

INFORMATION : Nunc pro tunc orders will be admissible in determining the eligibility of a child for purposes of title IV-E financial reviews under certain circumstances. For each nunc pro tunc order that is used to meet the statutory requirements in section 472(a)(1), contemporaneous court documentation must be submitted which will verify that the determinations were, in fact, made but were omitted from the record through inadvertency or mistake.

Acceptable documentation that may be requested by the Federal agency to make such a verification could include court transcripts, bench notes or other court documents which, in conjunction with the State agency's report, would confirm that the information was presented to the court and that the judicial determination(s) had been made at the original removal hearing.

Documentation such as post-hearing affidavits is not acceptable as verification. The reliability of affidavits executed long after a judicial proceeding is questionable. These limitations are necessary in order to assure children in foster care of the protections to which they are entitled under the title IV-E program.

INQUIRIES TO : Regional Administrators, OHDS
Regions I - X



Joseph Mottola
ACTING COMMISSIONER

hds human development services	U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES Administration for Children, Youth and Families	
	1. Log No. ACYF-IM-87-28	2. Issuance Date: 10/7/87
	3. Originating Office: Children's Bureau	
	4. Key Word: Title IV-E	5. <u>Nunc Pro Tunc</u> Orders
	6. Judicial Determination Requirements	7.

INFORMATION MEMORANDUM

TO : State Agencies Administering or Supervising the Administration of Title IV-E of the Social Security Act (the Act)

SUBJECT : Use of Nunc Pro Tunc Orders to Satisfy the Judicial Determination Requirements of Section 472(a)(1) of the Act

LEGAL AND RELATED REFERENCES : Sections 471(a)(15) and 472(a)(1) of the Act

PURPOSE : The purpose of this Information Memorandum is to clarify the Department's procedure in considering nunc pro tunc orders to meet the judicial determination requirements set forth in section 472(a)(1) of the Act.

BACKGROUND : Courts have the authority to enter an order nunc pro tunc to supply, for the record, something that has actually occurred, but was omitted from the record through inadvertence or mistake. A nunc pro tunc order, however, may not be used to predate the actual performance of an act that had not taken place. Thus, where a nunc pro tunc order does not simply correct errors or omissions, but actually modifies the substance of a prior ruling or constitutes a ruling not previously made, it cannot be given retrospective effect.

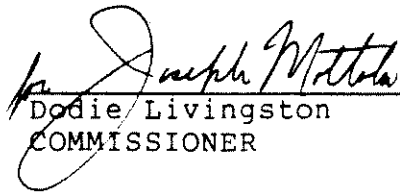
INFORMATION : This issuance clarifies the Department's procedure for title IV-E financial reviews when a nunc pro tunc order has been issued to satisfy the requirements for judicial determinations as set forth in section 472(a)(1) of the Act.

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In title IV-E financial reviews, for every child for which there is a nunc pro tunc order that is used to meet the statutory requirements in section 472(a)(1), States are required to submit documentation to verify that these findings were in fact omissions from the record through inadvertence or mistake. Requested documentation may include the transcript of court proceedings and/or the agency's report to the court, or any other documentation that would confirm that the information was actually presented to the court at the previous hearing and that the court made the determination(s) at that time.

INQUIRIES TO : Regional Administrators
Regions I - X


Dodie Livingston
COMMISSIONER